

ORIGINAL

Mayflower Music Corporation

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The Hon.
Mary Lou Burg
Chairman
Copyright Tribunal
1111 20th Street, N.W.
Washington, D.C. 20026

October 21, 1980

Dear Commissioner Burg,

With much interest I have followed the recent developments in the proceedings regarding a higher mechanical royalty in the United States. The information which has been made available to me as a member of the NMPA indicates that several important points have not been raised satisfactorily.

I would like to bring to your attention a few observations which I have made during the 8 years in which I have operated a small music publishing company in the United States. I would also like to compare these thoughts with the experience I have gathered in almost 15 years of operating a music publishing company in Munich, West Germany. The Mayflower Music catalogue is also represented in about 25 countries through subpublishers; this - in my estimation - enables me to state my opinions with reasonable confidence.

It is sufficiently known that the U.S. mechanical rates are the lowest among any major music market in the civilized Western world. It is less known to which extent these rates are actually paid and to which extent a small publisher confronts problems in his often futile attempts to collect what seems undoubtedly due to him.

U.S. record companies - may they be big or small - have found quite a number of ways to either avoid paying mechanical royalties at all or

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to at least reduce them significantly through "legal" means. I constantly face the impossibility to collect royalties from smaller record companies even over a period of three or more years after release of a record.

Muse Records, Audiofidelity Enterprises, Pausa Records, Inner City Records as well as a growing number of other small labels are simply refusing mechanical payments altogether. Knowing that the legal fees incurred in trying to collect through litigation are usually exceeding the amount due, they feel rather safe. The limitations of time make it also difficult to follow up since this follow up is required for almost every record company in the market.

It has happened more than once that record companies have either neglected to return the license agreement or have defaulted on their obligations pursuant to an executed license agreement. I have also more than once informed the record company that either a license agreement does not exist or it has been revoked. Consequently, the companies involved were then placed on compulsory license, meaning that royalties were due every 30 days on all records or tapes manufactured. Since the formation of Mayflower Music not one payment based on compulsory license has been received. In case of a previously unpublished composition I have given notice to record companies that I will not agree to continued sales of a recording containing copyrights controlled by Mayflower Music. Not in a single case has a label complied with this request.

A further problem exists because most labels are making little or no attempt to locate copyright owners, and unless the publisher finds out - through air play, reviews, buying a record in a store or other means - that a work is released he has little chance to establish the degree to which his catalogue is commercially used. Even Brasil is dealing more efficiently with this problem: record companies are required to inform publishers about their releases by sending out their "label copies" or other circulars to every publisher.

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Major companies are reducing their mechanical royalty payments through a variety of means. Firstly, most major labels are inserting clauses into their recording contracts whereby the artists agrees to license "controlled compositions" (compositions assigned to a publishing entity owned by the artist) at significantly lower rates. Since artist royalties are only paid on 90% of sales, this in connection with less than statutory royalties greatly reduces the mechanical royalty.

Often artists with valid publishing agreements sign these contracts either because of lack of proper legal advise or out of fear the record contract might be jeopardized through insisting on the rates as provided by the 1976 Copyright Act. Record company attorneys argue that the legal rates are actually "ceiling" rates similar to the highest interest rates banks are permitted to pay. Major companies are then using such a Paragraph in their agreements to stall royalty payments over a considerable period of time when the publisher insists on regular licensing procedures.

CBS, Arista, Atlantic among others use these methods constantly as a matter of policy. The CBS record club operation pays - also as a matter of policy - 75% of the legal rates whether the publisher agrees to the lower rate or not. High deductions are taken on their royalty statements for "reserves" and "free goods". The accounting procedures used in liquidating these reserves are mostly not revealed to the inquiring publisher. Record company attorneys and royalty accountants - for instance Arista Records and Elektra Records - openly admit their company's obligation to pay for the so called free goods. They also say that these payments are only made - again as a matter of policy - following an audit by the publisher or his agent. The cost of conducting such an audit is again often higher than the expected revenues - common knowledge by company executives.

Late payments also constitute a major problem. Record companies in England have long ago accepted the obligation to pay interest on late payments, and this has helped the publishers in that country considerably. In countries like Germany and Japan - as well as most other

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civilized countries - their exists little problem obtaining royalties since a Mechanical Right Society is actually enforcing the respective copyright laws - a prospect that seems like a dream to the small American publisher. Late payments are the common occurence with most record companies in America except the biggest; companies like Fantasy Records or Arista Records are usually late, small companies are generally late.

It would be an interesting experiment - one that might be of great informational value - to compare the following figures: The total amount of records sold in the U.S. as published by the RIAA. Providing an average of 25¢ to 27.5¢ of mechanical royalty per copy sold, over 25% of the number of records sold would then establish the Dollar amount of mechanical royalties paid.

It is common knowledge among all publishers that their will be an impressive divergence between these two figures. This discrepancy will, of course, be partly caused by "old license agreements" entered into before 1978. Numerous releases which have been in print since before 1978 only require the old 2¢ royalty which is paid late and after all of the above deductions are taken.

This in general overview leads to an astonishing fact that a small publisher like Mayflower Music only grosses 15 to 20% of his earnings in the largest and still most profitable record market in the world. Austria, with 3% of the population of the U.S. is grossing between 5 to 8%.

Mainly Japan, Germany and France are vastly outgrossing U.S. earnings through considerably smaller sales. In relation to the population a country like Holland is several times more profitable than the U.S. - and this without any problems at all in getting paid.

America is still a major source of musical talent for the world; probably the most influential country on Earth in this century. Sadly enough, nowhere is the creator and his trustee, the publisher, rewarded more poorly for his intellectual property. Nowhere - at least

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among the major industrial countries - must he spend more time and effort, go through more disappointment and frustration than in America, the country with the largest music industry of all.

The demand for a 6% royalty seems almost to have been made by record industry forces considering that England has had a 6 $\frac{1}{4}$ % royalty for many years and that most European countries as well as Brasil have accepted 8% long ago. However, the question is not whether the U.S. record industry will accept a 6% statutory royalty rate. The question is rather whether this royalty will be paid or whether it will be diluted as in the past to a much lower effective rate. The question will also be whether the copyright owners will have to continue to defend their right all by themselves.

A final remark: I estimate that 70% of all active copyrights in the U.S. are directly or indirectly controlled by music users, such as CBS, ABC, Chappell, Warner Brothers, United Artists and others. Obviously the National Music Publishers Association is greatly controlled by these companies. First because of their number among the members and second because of the "weighted" voting system which allows bigger companies more votes.

It seems that the opposition of the record companies to a higher mechanical royalty rate cannot quite be justified considering that most of the additional revenue will be paid to the subsidiaries of major labels. These publishing companies should also accept a moral obligation to represent their composers as effectively as possible. The apparent conflict of interest seems difficult to be resolved.

Together with every other independent publisher I sincerely hope that the Copyright Royalty Tribunal will establish rates on an internationally established level together with a reasonable degree of certainty for the copyright owners that these regulations will be adhered to.

Sincerely yours,

Eckart Rahn

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